IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8817 of 1990
with
SPECIAL CIVIL APPLICATION No.4929 of 1990

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHEMICALS AND RESINS LTD - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MR KH KAJI for Petitioner
MS REETA CHANDARANA, AGP for Respondent(s) : 1 – 2
Respondents No.3 – 4 – Served.

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CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 10/08/2006

ORAL JUDGMENT

1. By an order dated 23rd October 2003, it was directed that both these petitions be listed along with Special Civil Application No.2202 of 2003 and other matters. Upon perusal of the case papers it is found that except for the fact that in all the matters the issue involved pertains to the Bombay Electricity Duty Act, 1958 no other common issue is involved. Hence, at the request of Mr. Kaji, learned Advocate for the petitioner, both these petitions are separated from the group and taken up for hearing today. As identical issues are involved in both the petitions, the same were heard together and are being disposed of by this common judgement.

2. In Special Civil Application No.4929 of 1990 the petitioner has challenged the supplementary bill dated 27th March, 1990 issued by the respondent No.3, raising a demand of Rs.7,04,309.09 towards Electricity Duty for the period between 11.10.83 to 31.3.89 whereas in Special Civil Application No.8817 of 1990, the petitioner has challenged a similar supplementary bill dated 30th November 1990 for an amount of Rs.3,98,005.28 for the period between October 1983 to March 1989. The petitioner has also challenged the directions issued by the respondent No.2, Collector of Electricity Duty (hereinafter referred to as the Collector of ED) on the basis of which the supplementary bills have been raised. The petitioner also seeks a direction against the respondents to charge the petitioner at the rate

of 20% for the consumption of electricity duty treating it to be an industrial undertaking or at the rate of 30% treating it to be a service undertaking. The petitioner further seeks a direction against the respondents not to charge the petitioner at the rate of 60% under Item-7 of Part-I of Schedule I to the Bombay Electricity Duty Act, 1958 (the Act).

3. The facts involved in both these petitions being more or less identical, for the sake of convenience the facts stated in Special Civil Application No.4929 of 1990 are referred to hereunder:

3.1 The petitioner, a Registered Company is engaged in the manufacture of Formaldehyde and Hexamine since 1960. From 1980, the petitioner Company diversified its activities and over and above its manufacturing activities, it also started the work of storage of edible oil imported by Public Sector Undertakings like State Trading Corporation Ltd., National Dairy Development Board and also for storage of liquid chemicals imported by Public Undertakings like the State Trading Corporation Ltd., Indian Petroleum & Chemical Corporation Ltd., Indian Oil Corporation etc. and also by Private Sector Undertakings.

3.2 It appears that the Electricity Duty

Inspector inspected the premises of the petitioner on 21st June, 1988. In pursuance of the inspection report submitted by the Inspector, a show cause notice dated 28th August, 1988, came to be issued by the Assessing Officer, Office of the Collector of ED, calling upon the petitioner to show cause as to why electricity duty should not be charged and recovered at the rate of 60%, with effect from 11.10.1983, on the ground that the activities of the petitioner fall under item-7 of Part-I of Schedule-I to the Act. In response to the said show cause notice, the petitioner submitted its reply dated 5th September, 1988 to the Collector of ED. Till the date of the filing of Special Civil Application No.4929 of 1990, the proceedings initiated vide the aforesaid show case notice rested at this stage.

3.3 During the pendency of the aforesaid proceeding, it appears that the petitioner received bills for the month of April 1989 charging electricity duty at the rate of 60% instead of 20% as charged earlier. Pursuant to the aforesaid bill, the petitioner addressed a communication dated 6th May, 1989 to the Collector of ED stating the reasons as to why it should be charged electricity duty at the rate of 20% and not 60% as charged under the said bill. In reply to the aforesaid communication, the Executive Engineer, (D&M), Anjar by a communication dated 24th May, 1989 informed the petitioner that the petitioner has rightly been

charged duty at 60%; that as per the directives of the Collector of ED the rate of 60% would be effective from 11.10.83 and that necessary revised supplementary bill would be issued shortly.

3.4 Pursuant to the aforesaid communication, the petitioner vide communication dated 30th May, 1989 addressed to the Collector of ED, again disputed its liability to pay electricity duty at the rate of 60% and again pointed out at to why it was liable to be charged electricity duty at 20% and not 60%.

3.5 By a communication dated 19th February, 1990, the Executive Engineer (D&M), Anjar, informed the petitioner that as per the directives of the Collector of ED the rate of 60% would be effective from 11.10.1983 to 31.3.1989 and accordingly an amount of Rs.7,04,390-09 was liable to be recovered from the petitioner; that the statement in respect thereof had been sent to the audit department and would be sent to the petitioner within a short time; and that in the meanwhile the petitioner should make arrangement for funds.

3.6 In reply to the aforesaid communication, the petitioner vide communication dated 21.2.1990, pointed out to the earlier reply and called upon the Executive Engineer to supply copies of the Head Office’s Circular letter dated 15.4.1989 as well as the Government

Notification authorizing the respondents to recover electricity duty at a higher rate, retrospectively. It may be pertinent to note that copies of the aforesaid documents were neither supplied to the petitioner nor have they been produced on the record of either of the petitions.

3.7 Again, vide communication dated 3.3.1990 addressed to the Collector of ED, the petitioner requested for a reply to its earlier communications. The petitioner also pointed out the reason as to why if at all it is held that the petitioner is not to be treated as an Industrial Undertaking, it should be treated as a Service Undertaking. The petitioner requested the Collector of ED to direct the Gujarat Electricity Board (GEB) not to effect recovery at the rate of 60% for the period 11.10.83 to 31.3.1989 till such time as it receives his decision in the matter. The petitioner also requested for a copy Rules framed by the Government under the Act.

3.8 However, before taking any decision in the matter as requested by the petitioner, a supplementary bill dated 27.3.1990 to the tune of Rs.7,04,390-09 was issued for the period 11.10.83 to 31.3.1989. Being aggrieved by the aforesaid bill charging electricity duty at the rate of 60% with retrospective effect from October, 1983, the petitioner resorted to the statutory remedy of appeal before the State

Government under the provisions of Part II of Schedule I to the Act, challenging the said Bill as well as the order issued by the Collector of ED which had not been communicated to the petitioner.

3.9 By a communication dated 21st June, 1990, the State Government informed the petitioner to in the first instant to refer the dispute for decision to the Collector of ED and that thereafter, an appeal shall lie against such decision to the State Government.

3.10 Back to square one, the petitioner having been rendered remediless, in that the Collector of ED having turned a deaf ear towards its numerous requests to decide the dispute; the GEB issuing supplementary bill charging Electricity Duty at the higher rate of 60% with retrospective effect from October' 83 under the directives issued by the Collector of ED; copies of H.O. Circular No.1 dated 15.4.1989 which finds reference in the impugned bill as well as earlier communication dated 19.2.1990 though requested for not being supplied to the petitioner; and to make matters worse, the State Government refusing to entertain appeal against the aforesaid action of the respondents; was constrained to approach this Court invoking its writ jurisdiction by way of Special Civil Application No.4969 of 1990.

3.11 It appears that the aforesaid Special

Civil Application was filed on 9th July 1990 whereas by a communication No.Kutch/Exam/ GS/5.12.87/11908 dated 11th July, 1990 the Assessing Officer, Office of the Collector of ED, informed the petitioner that its activities fall under item-7 of Part-I of Schedule-I to the Act which is a residuary clause, and that accordingly the petitioner was liable to pay electricity duty at the rate of 60%. Pursuant to the aforesaid communication/order, the GEB issued a supplementary bill dated 30th November, 1990, in respect of the petitioner's consumer A/c No.2628 for the period October, 1983 to March, 1989. The aforesaid communication dated 11th July, 1990 finds reference in the said supplementary bill wherein the same is referred to as “Order of Collector of ED”. The aforesaid supplementary bill has been challenged by filing Special Civil Application No.8817 of 1990.

4. At the time of issuing notice in Special Civil Application No.4929 of 1990, on 16th July 1990, this Court had granted ad-interim relief restraining the respondents from disconnecting electricity supply to the petitioner. Subsequently by an interim order dated 4.10.1990 this Court had granted interim relief in the following terms:

> *“Interim-relief in terms of para 11(B) is granted on condition that the petitioner shall pay Rs.50,000/- every month towards the arrears. The*

petitioner shall pay the said installments in addition to the regular monthly bill. It will be open to the petitioner to pay the installments under protest. It will be open to the Electricity Board to recover interest on the installments if that is permissible under law."

By order dated 25/1/1991, similar ad-interim relief was granted in Special Civil Application No.8817 of 1990 except that the petitioner was required to pay Rs.25,000/- per month towards arrears.

5. Heard Mr.K.H.Kaji, learned advocate on behalf of the petitioner and Ms.Reeta Chandarana, learned Assistant Government Pleader for the respondents No.1 and 2. Though served, the respondents No.3 and 4 have not entered appearance.

6. The learned Advocate for the petitioner assailed the impugned action of the respondents mainly on three counts. (i) That there is no provision for retrospective billing under the Act and the rules. In the circumstances, the action of the respondents in issuing supplementary bill for the period 11.10.83 to 31.3.89 is without authority of law; hence, illegal and void ab-initio. (ii) That higher rate of electricity duty at 60% was sought to be recovered vide the impugned supplementary bills at the show cause notice stage, without determining the liability to be charged at the said rate. That such

recovery without determination of liability was unlawful. (iii) That there was no provision for recovery of electricity at a higher rate during the pendency of proceedings for determination of the nature of consumption of energy by the petitioner. It was submitted that until the Collector of ED decides the issue as to what is the nature of consumption of energy by the petitioner, the liability of the petitioner cannot arbitrarily be assessed under item-7 of Part I of Schedule I to the Act. The learned Advocate also submitted that before filing the present petition, the petitioner had resorted to the alternative remedy provided under the Act, but to no avail.

6.1 On merits, it was submitted that the petitioner was carrying on manufacturing activities, hence, it was an industrial unit as envisaged under section 2(bb) of the Act. It was submitted that in addition to the manufacturing activities, the petitioner was also carrying on activities of storage and preservation of chemicals and oils, hence, at best, the petitioner could be classified as a service undertaking under section 2(ee) of the Act, but in no case could the activities carried on by the petitioner be classified under item-7 of Part I of Schedule I to the Act, which is a residuary entry.

7. The learned Assistant Government Pleader,

instructed by officers from the office of the Collector of ED, supported the action taken by the respondent authorities. However, despite specific query in that regard, no order of the Collector of ED determining the liability of the petitioner to pay electricity duty at the rate specified for consumption of energy under Item-7 of Part I of Schedule I to the Act, was produced. No provision, Government Resolution or Circular of the Government empowering retrospective recovery of electricity duty at a higher rate was either produced or pointed out. The learned Assistant Government Pleader vehemently contended that as directed by the State Government in the communication dated 21st June, 1990, the petitioner ought to have preferred an appeal before the Collector of ED against the impugned Supplementary Bill. However, upon being called upon to point out any statutory provision vesting the Collector of ED with appellate powers, none could be pointed out. Upon perusal of the Act and the Rules framed thereunder, there does not appear to be any such provision for appeal before the Collector of ED.

7.1 The learned Assistant Government Pleader pointed out that the proceedings initiated vide the show cause notice dated 26th August, 1988 have culminated into an order dated 11th July, 1990 which has been annexed with the affidavit-in-reply dated 8th August, 2006 filed

in Special Civil Application No.8817 of 1990. The said order is admittedly passed after the filing of the Special Civil Application No.4929 of 1990. It may also be pertinent to note that though the respondent No.2, Collector of ED has filed its counter to the said petition, which is affirmed on 17th September 1990; the aforesaid order does not find even a mention in the said affidavit. As regards the nature of the said order, which is in the form of a communication addressed by the Assessing Officer, Office of the Collector of ED, it was submitted that the said order was passed with the approval of the Collector of ED. Whereas as mentioned hereinabove, in the supplementary bill dated 30th November, 1990 the same is referred to as an order of the Collector of ED.

8. As is apparent from the facts stated hereinabove, undisputedly during the pendency of the proceeding initiated vide show cause notice dated 28th June 1988 for determination of the rate of electricity duty payable by the petitioner, vide the impugned supplementary bill dated 27th March 1990 as well as regular bill in respect of electricity power consumption, the petitioner has been charged at a higher rate of electricity duty viz. at the rate of 60% instead of the rate of 20% as was being paid earlier. It cannot be gainsaid that the consequences of retrospective recovery of electricity duty at a much higher rate would entail civil

consequences, in that during the interregnum an irreversible situation would have arisen. The petitioner would have charged for the services rendered by it as well as for the products manufactured by it considering the rate of electricity duty that was being recovered at the relevant time. Such retrospective recovery would certainly cause undue hardship to the petitioner. In the circumstances, the respondents were duty bound to give the petitioner a reasonable opportunity of hearing before raising such a huge claim towards arrears of electricity duty. Of course proceedings in this regard were initiated. But without even waiting for its outcome, in the most arbitrary manner, duty at a higher rate has been recovered from the petitioner. As to what prevented the respondents from taking a decision pursuant to the show cause notice, before seeking to recover electricity duty at a higher rate is beyond comprehension.

8.1 Be that as it may, the concerned authority which had initiated proceedings as regards the liability to be pay electricity duty at a higher rate under item-7 of Part I of Schedule I to the Act, was duty bound to first take a decision thereon before seeking to recover electricity at the said rate. In the instant case during the pendency of the proceeding for determination as to the item of Part I of Schedule I to the Act under which

consumption of energy by the petitioner falls, the respondents have preempted the issue and issued the impugned supplementary bill seeking to recover electricity duty at a higher rate with retrospective effect from October 1983. Such action on the part of the respondents in raising bills prior to determination of its liability has left the petitioner without any remedy, in that, there is no order which the petitioner can challenge before the higher forum despite disputing its liability to be charged at a higher rate. Such arbitrary and capricious action on the part of the respondents cannot be countenanced.

8.2 As is apparent from the facts stated hereinabove, the petitioner has time and again beseeched the Collector of ED to take a decision on the issue in question, which has turned out to be an exercise in futility.

8.3 It has been vehemently argued on behalf of the respondents that the petitioner has not referred the dispute to the Collector of ED in the prescribed manner. Upon being called upon to point out as to what is the prescribed procedure, the learned Assistant Government Pleader drew and blank and could not point out any such procedure, even with the assistance of the group of officers present in the court. Upon perusal of the Act and the Rules, it is evident that no particular format has been prescribed

for referring a dispute to the Collector of ED. Under Part II of Schedule I to the Act, it is provided that where any dispute arises as to the item in the said Schedule under which any consumption of energy falls; the dispute shall be referred to such authority as the State Government may by notification in the Official Gazette specify. The authority concerned shall, after such inquiry as it deems fit, record its decision. It is an admitted position that the Collector of ED is the authority specified by the Government for referring any dispute under Part II of Schedule I to the Act. Thus, the dispute as to the item in Part I of Schedule I to the Act, under which the consumption of energy by the petitioner falls, is required to be referred to the Collector of ED. No procedure appears to have been prescribed providing for the manner in which such dispute is to be referred. In the facts of the present case, the petitioner has vide numerous communications addressed to the Collector of ED, as stated hereinabove, represented its case stating the nature of activities carried on by it to demonstrate as to how the consumption of energy by the petitioner does not fall under the residuary entry namely item No.7 of Part I of Schedule I and requesting him to take a decision in that regard, but to no avail. The Collector of ED has chosen to remain silent throughout.

8.4 Right from the time of filing its reply

to the show cause notice, the petitioner has addressed several communications to the Collector of ED to decide as to under which item of Part I of Schedule I to the Act, the activities carried on by the petitioner wall fall. The petitioner has also requested for a copy of the H.O. Circular No.1 dated 15th April, 1989, which finds reference in the communication dated 19th May, 1990 as well as in the impugned bill. However, neither of the said requests have been acceded to. Instead, during the pendency of the proceeding initiated vide show cause notice dated 28th August, 1988, not only was the petitioner charged at a higher rate in the regular bills, but, vide the impugned supplementary bill dated 27th March, 1990 retrospective recovery of arrears charging electricity duty at a higher rate was sought to be made. Faced with the aforesaid situation the petitioner availed of the statutory remedy of appeal before the State Government as provided under Part II of Schedule I to the Act, challenging the impugned supplementary bill as well as the decision of the Collector of ED which formed the basis for issuance of the bill, only to be told that its remedy lies elsewhere, namely before the Collector of ED. As a matter of fact any such directive/decision of the Collector of ED has still not come on record.

8.5 In the affidavit-in-reply dated 17th September, 1990 it has been stated that the bill

for arrears was issued as per the directives of the respondent No.2, since revised rate of electricity duty came into force on 11.10.83 and the same were made applicable to the petitioner. Nothing is pointed out that if the petitioner was at all liable to pay electricity duty at the revised rates, why the same was not recovered at the relevant time. No reply is coming forth either in the affidavits in reply filed in response to the petitions nor by way of submissions at the time of hearing of the matter, to point out that the concerned authority is empowered to retrospectively recover electricity duty charges for a period ranging up to 6 years.

8.6 In the aforesaid circumstances, the impugned supplementary bills seeking to recover electricity duty at a higher rate with retrospective effect from October 1983, are bad in law, in that, the same appear to have been issued without any authority of law as well as in breach of principles of natural justice. Retrospective recovery or for that matter even prospective recovery of duty at a higher rate entails civil consequences, hence, it is incumbent upon the authorities to abide by the principles of natural justice before seeking to make such recovery. The impugned supplementary bills, therefore, cannot be sustained.

8.7 On behalf of the petitioner it was

submitted that at this stage after a lapse of more than 15 years the petitioner should not be relegated to the Collector of ED and this Court may decide the issue in controversy, namely the item in Part I of Schedule I to the Act under which the activities carried out by the petitioner fall, viz. whether the petitioner is liable to pay electricity duty at the rate applicable to an industrial unit or a service undertaking or under the residuary clause. However, the said exercise would entail delving into disputed questions of fact, and appreciating the evidence on record to arrive at a factual finding as to under which item of the schedule the consumption of energy by the petitioner falls; there being no order of the Collector of ED or the State Government deciding the issue on facts. It is not the function of this Court in exercise of powers under Article 226 of the Constitution of India to embark upon a fact-finding inquiry. Of course the communication dated 11th July 1990 has been referred to as an order of the Collector of ED in the supplementary bill dated 30th November 1990, however, no formal order passed by the Collector of ED deciding the dispute under Part II of Schedule I to the Act has come on record. Hence, insofar as the main controversy at issue is concerned the matter is required to be referred to the Collector of ED in the first instance to decide the dispute raised by the petitioner under the provisions of Part II of Schedule I to the Act.

9. In the above view of the matter, the petitions succeed and are hereby allowed. The impugned supplementary bills dated 27th March, 1990 and 30th November, 1990 are hereby quashed and set aside. The Collector of Electricity Duty is directed to decide the dispute referred by the petitioner after giving the petitioner a reasonable opportunity of being heard. Till the Collector of ED decides the issue, the respondents shall not be entitled to charge electricity duty at the higher rate of 60%. The Collector of ED shall pass a detailed order dealing with all the contentions raised by the petitioner. The question of retrospective recovery shall be decided as a separate issue. If such retrospective recovery is upheld, the order shall specifically state the statutory provision or Government notification etc. that authorizes such retrospective recovery.

10. As the respondents have not been able to make out any case for retrospectively charging electricity duty at the higher rate of 60%, either in the affidavit-in-reply nor during the course of hearing of the writ petitions, it is deemed fit to direct the respondents to refund the amount recovered vide the impugned supplementary bills dated 27th March, 1990 and 30th November, 1990 within a period of three months from the date of receipt of a copy of this order. Such refund shall be subject to the

order that may be made by the Collector of ED in the aforesaid dispute referred to him under Part II of Schedule I of the Act.

11. It is clarified that while directing refund no order for payment of interest is being made. However, in the event the petitioner succeeds, even on the question of retrospective recovery of electricity duty at a higher rate, the petitioner shall be entitled to payment of interest at the rate of 9% per annum on the amount so paid from the date of payment till the date such amount is refunded.

12. Rule is made absolute accordingly. As both the petitions have been occasioned on account of the statutory authorities more or less having abdicated the duties entrusted to them under the Act, the petitioner shall be entitled to costs, quantified at Rs.5000/- in each of the petitions.

[HARSHA DEVANI, J.]

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